

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 28, 2009 Session

STATE OF TENNESSEE v. BRIAN A. SNYDER

**Appeal from the Criminal Court for Knox County
No. 83526 Mary Beth Leibowitz, Judge**

No. E2008-01595-CCA-R9-CD - Filed August 18, 2009

The Defendant, Brian A. Snyder, is charged with assault, a Class A misdemeanor. He sought pretrial diversion, and the District Attorney denied his request. Upon consideration of the Defendant's petition for writ of certiorari, the trial court found that the District Attorney did not abuse his discretion in denying pretrial diversion. We granted this interlocutory appeal to consider whether the trial court properly denied the writ of certiorari by finding that the District Attorney did not abuse his discretion. We hold that the trial court erred in finding that the District Attorney acted within his discretion. We reverse the order of the trial court and remand the case with instructions that the District Attorney shall consider the Defendant's application for pretrial diversion in light of all relevant factors.

**Tenn. R. App. P. 9 Interlocutory Appeal; Order of the Criminal Court Reversed;
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Gregory H. Harrison, Knoxville, Tennessee, for the appellant, Brian A. Snyder.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Randall E. Nichols, District Attorney General; and Kevin James Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The three-count indictment against the Defendant alleges various modes of assault of Timothy Beeler. The record contains no testimony or affidavit of complaint setting forth the facts, and the record reflects that the State's version of events is different from the Defendant's.

The Defendant's application for pretrial diversion recites that the incident in question took place when the Defendant and his ex-wife had a disagreement in a parking lot near a softball game

in which one of their two daughters was playing. The Defendant and the victim did not know each other, but the victim was dating a relative of the Defendant's ex-wife. The application states that the victim intervened in the disagreement between the Defendant and the Defendant's ex-wife, pointing his finger into the Defendant's chest repeatedly. It states that the Defendant requested that the victim withdraw in order for the Defendant and his wife to leave, but the victim continued pointing his finger into the Defendant's chest and made verbal threats. The Defendant struck the victim. The two men were separated by a bystander.

The District Attorney's letter denying pretrial diversion states that the Defendant first argued with one of his daughters and that the disagreement between the Defendant and his ex-wife took place in front of both of their daughters. It also states that the Defendant approached his ex-wife with raised fists, that the victim stepped between them and told the Defendant to leave, that the Defendant hit the victim, then the Defendant walked away but returned twice to hit the victim in the face again.

The application for pretrial diversion reflects that the Defendant was then forty-five years old. The Defendant left college in his fourth year in order to pursue a professional baseball career. After approximately four years of pursuing a career in baseball, the Defendant became employed with Averett Express, where he has remained employed. The Defendant advanced within the company and has received incentive awards. He has declined further advancement in order to remain in Knoxville near his daughters with his ex-wife. The Defendant has remarried. He attends church and has been involved in some church activities.

The Defendant's pretrial diversion application contained several letters of recommendation attesting to his good character and work ethic. A statement signed by the Defendant's attorney characterized the Defendant as "remorseful that such an event took place and . . . embarrassed and ashamed . . . [to be] a person accused of a crime." The application also contained a lengthy psychological evaluation of the Defendant, his ex-wife, and their children which was prepared for previous domestic litigation and noted a generally favorable view of the Defendant as a parent.

The District Attorney's letter denying pretrial diversion recites facts of the events giving rise to the charges, but it does not acknowledge the areas in which the Defendant's statement of facts from his application differ. The District Attorney noted that the Defendant had no criminal history, was well-regarded by his friends, and was an outstanding employee. However, the District Attorney noted that the Defendant's relationship with his ex-wife brought out his worst. The District Attorney also noted:

[The Defendant] is a former professional athlete with all the size, strength and agility that that [sic] encompasses. His children, as well as all the other children and parents and spectators watched [the Defendant's] actions on the night of this incident. Those who knew him and his status as a former professional baseball player watched as a poor example was set for those who were there to play or observe

the game of softball. [The Defendant's] own children cried in fear as they watched yet another display of how their father handles his emotions. In the psychological evaluation by Thomas Hanaway that was included in the material that [defense counsel] filed, there is the recounting of an incident where [the Defendant], in anger, grabbed [his ex-wife] by the arm and dragged her on the floor five or six feet. All of this in front of the older daughter, making a lasting impression on that daughter. In the evaluation Dr. Hanaway says that "[the Defendant] admits that this was a terrible thing to do especially considering that [the daughter] was present." Over time, [the Defendant's] behavior has not improved. When [the victim] became involved and tried to defuse what he saw as a potentially violent attack on [the Defendant's ex-wife] he was violently mistreated himself, and again the children are present.

In weighing the relevant considerations, the District Attorney said:

I can not place weight on the fact that [the Defendant] has no criminal record because all persons who qualify for diversion fall into the same position. His social background and work history weigh very heavily in his favor. His physical and mental condition have little weight on either side, however, they would tend to weigh against granting diversion as previously discussed. The most weight, in my consideration, would have to go to the factors of deterrence and the circumstances of this incident. It is for these reasons that I feel that justice to the public demands further prosecution of [the Defendant]. [The Defendant] has not benefitted from previous reliance on his own self control to curb his violent tendencies. It is my opinion that criminal prosecution will send a better message of deterrence to [the Defendant] and others in the community.

Upon reviewing the Defendant's petition for writ of certiorari, the trial court found that the District Attorney had properly weighed and considered the relevant factors and that there was substantial evidence to support the District Attorney's decision. Thus, the court found that the District Attorney did not abuse his discretion.

On appeal, the Defendant argues that the trial court erred in affirming the District Attorney's decision and that the District Attorney abused his discretion in denying diversion because he failed to weigh and apply the relevant factors. The State responds that diversion was properly denied.

In order to be eligible for pretrial diversion, a defendant must not have been previously granted diversion; must not have a prior misdemeanor conviction in which the defendant served a sentence of confinement or a prior felony conviction within a five-year period after completing the

sentence or probationary period for the prior conviction; and must not be seeking diversion for a Class A or B felony, a sexual offense, driving under the influence, or vehicular assault. T.C.A. § 40-15-105(a)(1)(B)(i)(a)-(c). The decision to grant or deny an application for pretrial diversion is within the discretion of the prosecuting attorney. T.C.A. § 40-15-105; State v. Curry, 988 S.W.2d 153, 157 (Tenn. 1999). In making this determination, the prosecutor should

focus on the defendant's amenability to correction. Any factors which tend to accurately reflect whether a particular defendant will or will not become a repeat offender should be considered. Such factors must, of course, be clearly articulable and stated in the record in order that meaningful appellate review may be had. Among the factors to be considered in addition to the circumstances of the offense are the defendant's criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant.

Curry, 988 S.W.2d at 157 (quoting State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983)). The prosecutor's response must be in writing, must list the evidence considered, and must point out any factual discrepancies between the evidence upon which the prosecutor relied and that presented in the defendant's application. Curry, 988 S.W.2d at 157. The response must discuss the factors considered by the prosecutor and the weight given to each factor. Id. The fact that a defendant has the burden of showing suitability for diversion does not relieve the prosecutor from the obligation to examine all of the relevant factors and to set forth the required findings. Id.

The decision of the prosecutor to grant or deny pretrial diversion is presumptively correct and will not be set aside absent an abuse of discretion. Id. at 158; Hammersley, 650 S.W.2d at 356. In reviewing the prosecutor's denial of pretrial diversion, the trial court may consider only that evidence considered by the prosecutor. Curry, 988 S.W.2d at 158. In order to find an abuse of discretion, the trial court must conclude that the record lacks substantial evidence supporting the prosecutor's determination. Id. The trial court "must not re-weigh the evidence, but must consider whether the district attorney general has weighed and considered all of the relevant factors and whether there is substantial evidence in the record to support the district attorney general's reasons for denying diversion." State v. Yancey, 69 S.W.3d 553, 559 (Tenn. 2002). "On appeal, the appellate court is bound by factual findings made by the trial court unless the evidence preponderates against them." State v. Bell, 69 S.W.3d 171, 177 (Tenn. 2002) (citing Curry, 988 S.W.2d at 158). If the facts are undisputed, the underlying issue for determination on appeal remains whether or not, as a matter of law, the prosecutor abused his or her discretion in denying pretrial diversion. State v. Carr, 861 S.W.2d 850, 856 (Tenn. Crim. App. 1993). Moreover, "upon review of a denial or grant of pretrial diversion, the Court of Criminal Appeals is limited to considering only the evidence that was considered by the district attorney general." Yancey, 69 S.W.3d at 559-60.

In the present case, the District Attorney detailed his consideration of the Defendant's application for diversion in a lengthy letter. However, the District Attorney presented facts that were more favorable to the State than those presented by the defendant's application, and the District Attorney failed to point out these factual discrepancies. See Curry, 988 S.W.2d at 157. In weighing the required considerations, the District Attorney relied upon deterrence and the circumstances of the incident to deny diversion. Given that he placed determinative weight on these factors, it was critical that he acknowledge and discuss the factual discrepancies, many of which bear on the egregiousness of the charges and whether the Defendant hit the victim once or three times, the latter of which was relevant because the Defendant was charged with and sought diversion for three counts of assault.

In addition, the District Attorney failed to give proper consideration to the Defendant's lack of a criminal record. He declined to accord this factor any weight, stating, "I can not place weight on the fact that [the Defendant] has no criminal record because all persons who qualify for diversion fall into the same position." See T.C.A. § 40-15-105(a)(1)(B)(i)(b) (Supp. 2008) (requiring that a Defendant receiving pretrial diversion shall not have a prior misdemeanor conviction for which he was confined or have completed a sentence or probationary period for a felony within the past five years). A District Attorney has within his discretion the weight to be accorded to the factors. See, e.g., State v. Beverly, 894 S.W.2d 292, 293-94 (Tenn. Crim. App. 1994) (holding, in the context of judicial diversion, that criminal behavior not resulting in a conviction may be considered in making the diversion decision). However, declining to accord the factor any weight on the basis that all applicants for diversion are equally qualified in this regard amounted to a disregard of this factor and was an abuse of discretion. Curry, 988 S.W.2d at 157 (requiring that District Attorney consider the Defendant's criminal record). In the present case, the Defendant not only qualified for diversion, he had no non-disqualifying convictions.

We conclude that the District Attorney abused his discretion in failing to consider the Defendant's lack of a criminal history. Likewise the District Attorney failed to consider the factual discrepancies between the evidence upon which he relied heavily in denying diversion and that evidence submitted in the Defendant's application for diversion. The trial court erred in not finding that the District Attorney abused his discretion and in not granting the writ of certiorari.

The question then becomes that of the proper remedy. The statute provides that upon a finding that the District Attorney has abused his discretion, the trial court "may" order the District Attorney to place the defendant on diversion. T.C.A. § 40-15-105(b)(3) (Supp. 2008). If the District Attorney has failed to consider all relevant factors, as opposed to having considered irrelevant ones, the trial court must order the District Attorney to weigh and consider the relevant factors, but the trial court may not substitute its own judgment for that of the District Attorney. State v. McKim, 215 S.W.3d 781, 788 (Tenn. 2007); State v. Bell, 69 S.W.3d 171, 178 (Tenn. 2002). The District Attorney in the present case failed to consider the Defendant's lack of a criminal history, and the trial court should have ordered him to weigh and consider this factor properly with the others. Because there was also an abuse of discretion in failing to account for the factual discrepancies, the trial court should have also ordered the District Attorney to consider these discrepancies on remand. See Bell,

69 S.W.3d at 179 (“[A] court cannot reasonably conclude that there is substantial evidence to support the district attorney general’s decision if in fact the district attorney general has not first considered all of the relevant factors and their relative weight.”).

We reverse the order of the trial court and remand the case with instructions that the District Attorney shall reconsider the Defendant’s application for pretrial diversion in light of all the relevant factors.

JOSEPH M. TIPTON, PRESIDING JUDGE